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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT 28 HON. YVETTE M. PALAZUELOS, JUDGE

PICO NEIGHBORHOOD ASSOCIATION,)
ET AL.,)
)
PLAINTIFFS,)
)
VS.) CASE NO. BC616804
)
CITY OF SANTA MONICA, ET AL.,)
)
DEFENDANTS.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL
FRIDAY, AUGUST 10, 2018
A.M. SESSION

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I N D E X

8/10/18, A.M. SESSION

<u>PLAINTIFFS' WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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DR. J. MORGAN KOUSSER		1180 (CONT)		
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E X H I B I T S

<u>NUMBER</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
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1274	1176	1176
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1 CASE NUMBER: BC616804
2 CASE NAME: PICO VS SANTA MONICA
3 LOS ANGELES, CALIFORNIA FRIDAY, AUGUST 10, 2018
4 DEPARTMENT 28 HON. YVETTE M. PALAZUELOS
5 REPORTER: RHONA S. REDDIX, CSR 10807
6 TIME: A.M. SESSION
7 APPEARANCES: (SEE TITLE PAGE.)
8
9

10 **THE COURT:** Pico Neighborhood Association versus
11 City of Santa Monica, BC616804. Good morning.
12

13 (Responses.)
14

15 **THE COURT:** Counsel, make your appearances.

16 **MR. PARRIS:** R. Rex Parris on behalf of the
17 Plaintiffs.

18 **MR. SHENKMAN:** Kevin Shenkman, also on behalf of
19 the Plaintiffs.

20 **MR. RUBIN:** Robert Rubin on behalf of the
21 Plaintiffs, Your Honor. Good morning.

22 **MR. GORDON:** Ellery Gordon on behalf of the
23 Plaintiffs.

24 **MR. MCRAE:** Marcellus Mc Rae, Gibson, Dunn &
25 Crutcher, appearing on behalf of the City of Santa
26 Monica.

27 **MR. SCOLNICK:** Kahn Scolnick on behalf of the City
28 of Santa Monica.

1 **MR. MCRAE:** We have one more, Your Honor.

2 **MS. MOSHELL:** Marissa Moshell appearing on behalf
3 of the City of Santa Monica.

4 **THE COURT:** Thank you.

5 Okay. You wanted to talk to me about
6 something?

7 **MR. PARRIS:** Yes, Your Honor. Yesterday -- last
8 night, till about 10:00, 10:30, we were taking the
9 deposition of Mr. Vazquez.

10 **THE COURT:** Surprised you're all here, not asleep.

11 **MR. PARRIS:** Numerous issues arose. I think the
12 most pressing one was there apparently was a survey
13 commissioned by the City to investigate whether or not
14 there was polarized voting and the other issues of this
15 case. The --

16 **THE COURT:** Survey of whom?

17 **MR. PARRIS:** I'm sorry. What?

18 **THE COURT:** Survey of whom?

19 **MR. PARRIS:** The voters of Santa Monica.

20 **THE COURT:** Okay.

21 **MR. PARRIS:** Very much like Dr. Ely gave is
22 what -- the impression we got.

23 **THE COURT:** Okay.

24 **MR. PARRIS:** Very limited questions were allowed
25 to be answered. And I don't have the transcript, but I
26 believe when I asked him of the report that they did,
27 did not find that there was not polarized voting. And
28 he was allowed to answer that question and he answered

1 it that no -- how did he answer it? Anyway, we talked
2 about the report.

3 He also said that he had a recollection of
4 council members, outside of executive session,
5 discussing the report. So -- and we're unsure if
6 executive session means you can't see it, meaning we
7 can't subpoena it to court, or they're just not allowed
8 to talk to the public about it.

9 My understanding, and -- you know, and we
10 have executive session every two weeks -- is that we're
11 just not allowed to talk about it outside, but under
12 subpoena we have to. Now, that's my understanding, but
13 I haven't researched it. Nonetheless --

14 **THE COURT:** Is this a written report?

15 **MR. PARRIS:** It was unclear. It was unclear.

16 But there was a demographer and the issues
17 were explored and discussed with the counsel. And we're
18 investigating at this point, you know, further to find
19 out who, what, when, and where with our investigators.
20 But so far we believe any privilege has been waived, if
21 any privilege existed in the first place. Because I
22 asked him --

23 **THE COURT:** Well, did they assert a privilege at
24 the deposition?

25 **MR. PARRIS:** Sometimes. Sometimes they did not.

26 **THE COURT:** Okay.

27 **MR. PARRIS:** The --

28 **THE COURT:** Litigation privilege? What was the

1 privilege?

2 **MR. PARRIS:** Attorney-client privilege.

3 **THE COURT:** Okay.

4 **MR. PARRIS:** But when I asked him was this report
5 presented by a lawyer or by someone else, he said he
6 wasn't certain, but he did not think it was a lawyer.

7 **THE COURT:** Okay.

8 **MR. PARRIS:** Okay? It goes directly to the heart
9 of this case. And I don't think the attorney-client
10 privilege extends so far that you can commission studies
11 like that, report them to the council, and then keep
12 them secret even though the council is discussing it
13 outside the executive session.

14 There was also a -- an analysis done of the
15 2016 election in regards to Latino voters and
16 Mr. Vazquez, that one of the council members had done,
17 and that hasn't been ever mentioned or brought forward.
18 We need all of that and we need it immediately for
19 obvious reasons.

20 **THE COURT:** Okay. So when was the first one done,
21 the first survey? The first one -- the second one is
22 analysis of the 2016 election. What was the first one?

23 **MR. SHENKMAN:** I don't -- it's probably not fair
24 to characterize it as survey. I think it was
25 characterized as a study.

26 **THE COURT:** It's a study?

27 **MR. SHENKMAN:** But it may not make a difference.
28 And I'm not sure it was terribly clear when this was

1 done. I think --

2 **MR. PARRIS:** Within three years is what they --

3 **THE COURT:** Within the last three years? Okay.

4 **MR. PARRIS:** Yes.

5 **MR. MCRAE:** Your Honor, there is no study. This
6 is -- Mr. Scolnick was at the deposition. We've spent
7 now five minutes. There was no study, there was no
8 poll, there was no survey.

9 Now, obviously, the Court is at a
10 disadvantage because you don't have the deposition
11 transcript. Here's the point: We have the deposition
12 transcript. At some point we can get it. But I've been
13 informed that there's no study, there's no poll, there's
14 no survey.

15 What apparently happened -- and
16 Mr. Scolnick can explain this -- is that apparently
17 counsel is speculating and misinterpreting answers to
18 create an issue that doesn't exist, meaning he doesn't
19 know what he's talking about. He's interpreting the
20 witness's answer to imply that there's some study or
21 survey. What we're literally...

22
23 (Counsel spoke *sotto voce*.)

24
25 **MR. MCRAE:** Understood.

26 So, Your Honor, the point is we -- I have
27 been informed that at this moment we are not aware of
28 any study or any survey, et cetera. We don't have the

1 transcript.

2 Mr. Scolnick, you were there. Please go
3 ahead.

4 **MR. SCOLNICK:** I was there, Your Honor. I would
5 agree with Mr. McRae that counsel is speculating or
6 asking questions about what he thinks happened.

7 And Mr. Vazquez did not say there was some
8 written or other presentation. He was unclear about --
9 when he was talking about inside or outside he'd seen --
10 he'd seen, I think, the reports of the experts in this
11 case at some point, probably through the city, that
12 they're talking about. Think that's what he probably
13 was referring to. But he did not say that the City had
14 done some survey or analysis that was presented secretly
15 to the council. That's just inaccurate and it's
16 speculation on -- and misinterpretation, frankly. And I
17 suggest we just get the transcript. They can say
18 whatever they want and we'll deal with it.

19 **MR. PARRIS:** Your Honor, I really don't appreciate
20 counsel telling me I don't know what I'm talking about.
21 I'm getting tired of this.

22 But that being said, the fact of the matter
23 is, is every time I asked about the report or the
24 study -- not every time -- half the time there was an
25 objection of attorney-client privilege. Well, if there
26 isn't any report, why is he objecting to attorney-client
27 privilege? He should have just let him answer. I mean,
28 clearly there is. By Monday I suspect --

1 **THE COURT:** Well, that is curious.

2 **MR. SCOLNICK:** It's not, Your Honor. I'll answer.

3 **MR. PARRIS:** Let me finish.

4 **THE COURT:** Okay.

5 **MR. PARRIS:** By Monday I should probably have the
6 name of the person who did the study, because we are
7 actively investigating this. On Monday I would
8 request -- respectfully request that we deal with this
9 issue and we be given whatever was withheld.

10 **THE COURT:** Okay.

11 **MR. SCOLNICK:** Your Honor, I was asserting
12 attorney-client privilege for every question that asked
13 about special sessions -- you know, closed sessions
14 where the attorneys present information to the city
15 council. Anytime they asked a question, I was asserting
16 the privilege.

17 I was also asserting lack of foundation
18 because they were assuming repeatedly, for hours, there
19 had been something done, when Mr. Vazquez did not say
20 there been something done. So they're trying to create
21 a sort of specter, as if there was an assertion of
22 privilege, and that must mean there was something done.
23 That is not the case, Your Honor.

24 **MR. SHENKMAN:** Your Honor, Mr. Vazquez testified
25 that there was a presentation to the council --

26 **THE COURT:** But when?

27 **MR. SHENKMAN:** -- of this study.

28 **THE COURT:** Because there has been presentations

1 to councils at various times concerning this issue. So
2 going to have to nail this down.

3 **MR. MCRAE:** In closed session, Your Honor.

4 **MR. PARRIS:** This is how it went down, is I said
5 was there a study -- or actually I think I said report,
6 to the council about whether or not the City is
7 polarized, and counsel -- and without saying when and
8 where, was there such a report? Counsel says as long as
9 you didn't hear it from counsel, as long as it's not
10 privileged, and as long as it's not in executive
11 session.

12 I mean, there wasn't any doubt in that room
13 last night that this happened and that this occurred.
14 Wasn't any doubt at all. And it's all on film. We'll
15 produce it for you.

16 And for them to say there's no report,
17 no -- first of all, it's ludicrous to assume that.
18 Millions of dollars are being spent on this litigation.
19 Wouldn't they first find out if they're in violation of
20 the law?

21 I mean, seriously, Your Honor, it defies
22 reason to believe that Mr. Vazquez wasn't talking about
23 a presentation that was made to the council regarding
24 polarization of that community. And if that occurred,
25 we're entitled to it.

26 **MR. MCRAE:** Your Honor, we've already -- I think
27 we're just repeating ourselves at this point. We've
28 explained, in the case of Mr. Scolnick, the reason that

1 the privilege was asserted was because of the nature of
2 the deliberations and discussions.

3 **THE COURT:** Okay.

4 **MR. MCRAE:** And so at this point I think we're at
5 an impasse here. We can get the transcript. They can
6 make whatever argument they want to make and then we can
7 definitize this and have a resolution.

8 **THE COURT:** I think that's a good idea. Let's
9 wait for the transcript or tape or whatever it is.
10 Okay.

11 **MR. PARRIS:** Thank you, Your Honor.

12 **THE COURT:** Thank you.

13 **MR. SCOLNICK:** I have a couple of issues to get
14 through.

15 **THE COURT:** Okay.

16 **MR. SCOLNICK:** One, our favorite topic, the
17 designations. I think maybe there's confusion, maybe
18 just on my part, about the process. We're done. The
19 City's done with designations. I think the
20 Plaintiffs -- the only thing left to do is just submit
21 them to the Court.

22 **THE COURT:** If they have objections to your
23 counterdesignations, they can do that.

24 **MR. SCOLNICK:** They can just do it and we don't
25 need to see those. We don't need to see those.

26 **THE COURT:** Well, whoever is preparing it should
27 see them.

28 **MR. SHENKMAN:** I think what we discussed was that

1 was going to be done by the end of the day today, and
2 then we're going to have everything together for the
3 Court on Monday morning.

4 **THE COURT:** You are, the Plaintiffs?

5 **MR. PARRIS:** Is that right?

6 **MR. SHENKMAN:** Yes.

7 **MR. SCOLNICK:** We would suggest if everything's
8 done today, let's give it to the Court today. We don't
9 need to see them again. They're going to make
10 objections, let them make objections. Your Honor will
11 rule --

12 **THE COURT:** I thought it was Monday.

13 **MR. SCOLNICK:** That was the confusion, because
14 what happens between today and Monday is unclear to me.
15 They're done. They're going to get them to us, for
16 whatever reason I don't know, and then they can submit
17 them.

18 **THE COURT:** Well, if you don't want them, they
19 don't have to give them to you, but --

20 **MR. SHENKMAN:** Your Honor, the only difference is
21 the court ends at 3:00 o'clock today and we're going to
22 take -- you know, we got a little more time before the
23 end of the day --

24 **THE COURT:** Okay.

25 **MR. SHENKMAN:** -- to get it over to Defendant and
26 then we'll have it for the Court --

27 **THE COURT:** I guess my question is do you want
28 them at the end of the day, whatever he's preparing?

1 **MR. SCOLNICK:** What I would like, Your Honor, is
2 for them to submit them to the Court today. There's no
3 reason to wait over the weekend. Because I worry there
4 are going to be more changes or more differences over
5 the weekend, and we've just gone through this over and
6 over and over again. I'm asking for them to be
7 submitted today.

8 **MR. PARRIS:** The Court has ordered us to do it on
9 Monday.

10 **THE COURT:** Yeah, Monday is fine. Just keep it
11 Monday.

12 **MR. SCOLNICK:** Okay.

13 **THE COURT:** You can get served as soon as they get
14 it, okay, which I'm assuming is at the end of the day
15 today?

16 **MR. SHENKMAN:** Yes, Your Honor.

17 **THE COURT:** Okay.

18 **MR. SCOLNICK:** Okay. Thank you.

19 Two more issues. One, we filed a motion
20 for sanctions yesterday. Your Honor asked us to talk
21 about it. I would ask that there be some briefing
22 schedule set.

23 **THE COURT:** What's the sanctions based on?

24 **MR. SCOLNICK:** The sanctions are issue sanctions,
25 evidentiary sanctions, and monetary sanctions for what
26 has now been revealed through Ms. Loya's testimony as
27 perjury, perjury about discovery misconduct. And I
28 could walk the Court through it in a minute if you'd

1 like.

2 **MR. PARRIS:** If we're going to start passing
3 around the --

4
5 (Indiscernible: speaking simultaneously.)

6
7 **MR. SCOLNICK:** Your Honor, if I may.

8 **THE COURT:** Let him finish.

9 **MR. SCOLNICK:** Your Honor, this is an issue that
10 has been percolating for two years. We moved to compel.
11 We got an order from the discovery referee that says you
12 need to search your e-mails, 45 specific categories.

13 Ms. Loya and Mr. De La Torre submit, under
14 penalty of perjury, they did so and they found no
15 documents. Ms. Loya came to court, testified there was
16 no search. She did nothing in March of 2018, before she
17 signed that penalty of perjury statement. She did
18 nothing the year before, when she said she produced
19 documents. She did nothing. She never searched her
20 e-mails. She did nothing before signing that
21 certification under penalty of perjury, which said I did
22 a good faith search as to 45 categories and I found no
23 documents. We know that was not true. She admitted in
24 court she never did that search. That is perjury, Your
25 Honor.

26 And then they come to court. During the
27 middle of the trial, produce 19 e-mails. We've laid out
28 in the brief why that is totally insufficient as to

1 custodians, as to search terms. Some of the documents
2 are redacted, Your Honor. You don't do discovery as a
3 remedy for a discovery violation. The remedy is
4 sanctions.

5 And so that's why we would urge Your Honor
6 to let the Defendants brief this -- or let the
7 Plaintiffs brief this and Your Honor can hear it and do
8 whatever the Court pleases with what has now been shown
9 to be -- and I don't use that word lightly -- perjury.

10 **THE COURT:** Okay.

11 **MR. SHENKMAN:** Your Honor, I think it's incredibly
12 irresponsible to be throwing around the word "perjury"
13 with respect to Ms. Loya.

14 And what Defendant's counsel fails to
15 mention is that the same issue was briefed to the
16 discovery referee on the motion for sanctions, that
17 apparently now they're trying to renew through Your
18 Honor, and the discovery referee denied that motion.

19 The rationale still applies. Nothing
20 substantial has changed. There -- there -- an issue
21 arose with respect to some e-mails in the G-mail
22 account; they were provided. Your Honor suggested that
23 we provide everything in the constant contact e-mail; we
24 did that. The Facebook account was reactivated.

25 We could keep going with this, never
26 ending, but I think, you know, there was -- I think what
27 the Court did yesterday is direct us to meet and confer.
28 There was no meet and confer. Instead, Defendant's

1 counsel comes here this morning, after being directed to
2 meet and confer, and says, well, we want a briefing
3 schedule for that stack of papers that we filed.

4 **MR. SCOLNICK:** I attempted to meet and confer last
5 night. Counsel refused.

6 And, Your Honor, the discovery referee did
7 not have the information you now have. She didn't have
8 Ms. Loya testify that she falsely stated under oath that
9 she did not do a search when she said she did. She
10 didn't have the Schloss e-mails that were produced on
11 the first day of trial, which proves she was lying
12 because there are documents that exist, that she said
13 and her counsel said didn't exist.

14 **MR. PARRIS:** Your Honor, if I may. Really? I
15 mean, she is not a lawyer. She is not -- she does not
16 have the level of sophistication of Gibson, Dunn. Why
17 Gibson, Dunn simply didn't say we want the hard drive so
18 we can mirror it, like they do in every other class
19 action case I'm involved in with them. They knew how to
20 get this material if they wanted to, but instead what do
21 they do? They expect a lay witness to know which terms
22 to search, to know how to -- to know -- to read their
23 mind what they want.

24 What she does is she asks her attorney,
25 what does this mean? There's a discussion that takes
26 place. But what I -- I did not see the diligence that I
27 would have preferred if I was doing it or one of my
28 employees was doing it, but she's not one of my

1 employees. She's a -- she's a community activist doing
2 the best she can, without a budget essentially,
3 without -- without a budget, coming up against a
4 2000-man firm, who expects her to have the same
5 knowledge they do.

6 Now, to stand here and call her a liar,
7 please. Was she -- was she -- did she do it perfectly?
8 Of course not. Did she do it the best she could? I
9 thought she did. I thought she did. I thought with all
10 of the things going on in her life, that she did.

11 I mean, it's not like she's getting paid to
12 do this. It's not like this is -- this is a personal
13 injury case where she's going to benefit from it. She's
14 a community activist attempting to improve her
15 community. She did the best she could. I think counsel
16 could at least have the courtesy of not calling her a
17 liar.

18 Now, if there's something that is
19 appropriate arising out of that, we should have that
20 discussion, but we should have that discussion as
21 professionals, with civility and not calling people
22 liars. If they want to do that, I mean, there's
23 certainly enough room for us to be doing it. And I just
24 think it's inappropriate.

25 **MR. SCOLNICK:** Your Honor, I don't use that word
26 lightly. It's perjury. There's no other way around it.
27 She signed a certification under penalty of perjury.
28 She didn't say I was too busy, I didn't know what to do.

1 She was directed by her lawyers not to do a search that
2 she'd been ordered to do, and then she falsely said she
3 did the search and found no additional documents. That
4 is perjury.

5 And she wasn't operating without counsel.
6 She is not a pro se plaintiff. The counsel has an
7 obligation to understand what their client's electronic
8 discovery obligations are, to communicate those, and
9 make sure a good faith search has been done, especially
10 when they have been ordered to do it by a referee,
11 especially when their client certifies under penalty of
12 perjury that it was done. We now know unequivocally it
13 was never done.

14 **MR. PARRIS:** Then call me a liar; don't call her
15 one. That is over the top.

16 **MR. SCOLNICK:** He didn't sign a certification,
17 Your Honor.

18 **MR. PARRIS:** You know, anything an attorney says
19 in this courtroom is under penalty of perjury. We are
20 officers of the court. And I would strongly suggest
21 that we keep this civil in light of what's -- in light
22 of whether or not there's a report.

23 **MR. SCOLNICK:** I would urge Your Honor to read our
24 papers. It's laid out there. It is unequivocally
25 perjury.

26 **THE COURT:** Okay. Well, let's put it this way:
27 This is a very thick document. I can't read it now --

28 **MR. SCOLNICK:** Understand.

1 **THE COURT:** -- and I can't hold a hearing on this
2 now, so...

3 **MR. SCOLNICK:** I know. All I'm asking Your Honor
4 to do is set some sort of briefing schedule. We suggest
5 they respond by next week. Your Honor can take it under
6 submission and do whatever you want with it.

7 But it's a very serious issue and we don't
8 think it should just be swept under the rug because
9 she's busy. We believe there's been perjury, and it's
10 been prejudicing the City for two years in discovery.

11 **THE COURT:** Okay.

12 **MR. SHENKMAN:** Your Honor, we were in the
13 deposition of Tony Vazquez last night. I haven't had an
14 opportunity to read it, but my colleagues have pointed
15 out to me there's a list of search terms in that
16 briefing that was never communicated to us.

17 And what I suggest to counsel at the end of
18 the day is, you know, here's these lists of search terms
19 that you wanted. Never seen this. Why don't you just
20 come to us and say, hey, search for these terms? That
21 wasn't what their document request said, but if you want
22 us to search for these terms in her e-mail and you think
23 that something's missing, I don't have a huge problem
24 with that. But that's not -- that's not perjury.
25 That's not sanctions. That's -- that's counsel get
26 together, just like this Court instructed yesterday.

27 **MR. PARRIS:** And there's no rush. There's no
28 rush.

1 **THE COURT:** There is no rush; so I'm not going to
2 address this right now. But in terms of the briefing
3 schedule, it's difficult for attorneys to be in the
4 middle of trial, opposing motions like this, which are a
5 little bit complex. So I'll set it out when I'm ready
6 to set a schedule --

7 **MR. SCOLNICK:** Thank you, Your Honor.

8 **THE COURT:** -- okay, but not now.

9 **MR. SCOLNICK:** Thank you.

10 And one last issue then, much more minor
11 hopefully. We were doing an inventory of the exhibits
12 last night and we noticed that Exhibit 1274, which is
13 the demographer Mr. Ely's precinct demographics, it was
14 discussed. And I don't think -- it's up right now on
15 the screen. I don't think it was entered into evidence.

16 **THE COURT:** Okay. Let me check my notes. 1274?

17 **MR. SCOLNICK:** Yep.

18 **THE COURT:** Yes, I think you're right.

19 **MR. SCOLNICK:** Okay. May we enter that?

20 **THE COURT:** Do we have an identification during
21 the trial of that? Is it on the cert?

22 **MR. SCOLNICK:** It's in the transcript. It would
23 have been on Friday.

24 **THE CLERK:** August 7.

25 **MR. SCOLNICK:** No, it would have been the 3rd.

26 **THE CLERK:** The 3rd?

27 **THE COURT:** Yes. August 3rd is Friday. Do we
28 have that? I don't, but --

1 **MR. SCOLNICK:** We can present the transcript if
2 you want, Your Honor.

3 **THE COURT:** Is there an objection to that one?

4 **MR. GORDON:** Mr. Holbrook's statement?

5 **MR. SCOLNICK:** No, no. This is Ely's
6 five-precinct demographics.

7 **MR. SHENKMAN:** There's no objection.

8 **MR. GORDON:** No objection.

9 **THE COURT:** 1274. That says 274, but I think it's
10 1274.

11 **MR. SCOLNICK:** It is.

12 **THE COURT:** All right. Let's receive it on --

13 **MR. SCOLNICK:** Thank you.

14 **THE COURT:** I guess for today. Today is the 10th.

15
16 (Exhibit 1274, identified:
17 Mr. Ely's five-precinct
18 demographics, received.)
19

20 **MR. SHENKMAN:** Your Honor, at the risk of even
21 more issues, the statement by Mr. Holbrook, I think we
22 have some agreement, some not agreement, but Mr. Gordon
23 can address that.

24 **THE COURT:** Redactions you mean?

25 **MR. GORDON:** Yes, Your Honor. Mr. Scolnick and I
26 have met and conferred. We have a highlighted -- we
27 have a clean copy for you. We also have our highlighted
28 portion which both parties agree can be redacted. It's

1 the third paragraph on the second page. And then I also
2 have Mr. Scolnick's portion that he would like to have
3 redacted, which is underlined. So I was hoping to
4 provide the Court with a clean copy and then the copy
5 with underlines and the highlights and the Court can
6 decide which would be redacted.

7 **THE COURT:** Why don't you just give it to me now.

8 **MR. GORDON:** Sure. If I may just add, the Court's
9 order was to exclude the thoughts of others.

10 **THE COURT:** Right.

11 **MR. GORDON:** And so that's where the disagreement
12 is, Your Honor.

13 **THE COURT:** Well, he's recounted the redacted as
14 well.

15 **MR. SCOLNICK:** Right, exactly. And we would say
16 anything other than his own impressions.

17 **MR. MCRAE:** Your Honor, I'm just going to step out
18 for a second, but I'll be right back.

19 **THE COURT:** Okay.

20 Let me just take a look. I thought there
21 were three pages.

22 **MR. SCOLNICK:** No. It's two, Your Honor.

23 **MR. GORDON:** Only two, Your Honor.

24 **THE COURT:** All right. So highlighted is you
25 agree?

26 **MR. GORDON:** Correct, Your Honor.

27 **THE COURT:** Okay. Underline is defense wants?

28 **MR. SCOLNICK:** Yes.

1 **MR. GORDON:** Yes.

2
3 (PAUSE IN THE PROCEEDINGS.)

4
5 **THE COURT:** Okay. I'm going to sustain the
6 objection as to the first one but not the second.

7 **MR. SCOLNICK:** Second one, referring to the second
8 page, the fourth paragraph?

9 **THE COURT:** Yes, right. Beginning "I believe
10 because district elections." I'm going to overrule the
11 Defense objection, but I'm sustaining it as to the
12 first.

13 **MR. SCOLNICK:** May I be heard briefly?

14 **THE COURT:** Okay.

15 **MR. SCOLNICK:** Just on the second one, the second
16 page "I believe" statement, that is just his speculation
17 about what other people think and why other people did
18 something 25 years ago. That's not something that goes
19 to his own state of mind. I mean, he's speculating
20 about other people's states of mind. And this is not
21 something that Dr. Kousser should be able to be relied
22 upon, if it's a hearsay exception for his own state of
23 mind 25 years ago.

24 **MR. GORDON:** Your Honor, I have the transcript
25 from yesterday and the order was to redact what he
26 thought other people thought. That statement is pretty
27 clear in the text. It says "I believe." So I think
28 that's -- I think the Court's inclination to overrule

1 that objection is correct.

2 **THE COURT:** Okay. The ruling stands.

3 **MR. GORDON:** Okay.

4 **THE COURT:** Thank you.

5 **MR. SCOLNICK:** Thank you, Your Honor.

6 **THE COURT:** You know, perhaps we should keep those
7 in the record if you don't mind. Counsel, let me keep
8 those two documents.

9 **MR. SCOLNICK:** Those aren't coming --

10 **THE COURT:** Just for the record.

11 **MR. SCOLNICK:** Yeah, those aren't coming in.

12 **THE COURT:** No, not -- just for appeal purposes.

13 **MR. SCOLNICK:** Got it.

14 **THE COURT:** Okay. Anything else before we resume?

15 **MR. MCRAE:** No, Your Honor.

16 **THE COURT:** Dr. Kousser?

17
18 **(PAUSE IN THE PROCEEDINGS.)**

19
20 **MR. MCRAE:** Your Honor, did anything need to be
21 said as a preamble? I know the Court --

22 **THE COURT:** No.

23 You understand you're still under oath?

24 **THE WITNESS:** Yes.

25 **THE COURT:** Okay.

26 **MR. MCRAE:** May I proceed, Your Honor?

27 **THE COURT:** Yes.
28

1 J. MORGAN KOUSSER, Ph.D.,
2 CALLED AS A WITNESS, WAS PREVIOUSLY SWORN AND TESTIFIED
3 AS FOLLOWS:
4

5 **CROSS-EXAMINATION** (CONTINUED)

6 **BY MR. MCRAE:**

7 **Q** Good morning, Dr. Kousser.

8 **A** Good morning.

9 **Q** Dr. Kousser, yesterday where we left off is
10 we were talking about the discussion in your declaration
11 of voting rights and a portion of your declaration that
12 was an application of what you believed to be the legal
13 standards governing racially polarized voting, those
14 results. Do you recall that discussion?

15 **A** Yes.

16 **Q** And, sir, you agree that this is something
17 that, once the Court determines what the correct legal
18 standards are, the Court obviously is going to apply
19 those legal standards to the facts in this case? You
20 understand that; right?

21 **A** Yes.

22 **Q** But you -- we talked about this. You
23 phrased your ultimate opinions in terms of certain legal
24 terms; isn't that right, sir?

25 **A** Yes.

26 **Q** So I want to discuss with you what you mean
27 when you use some of those legal terms in stating your
28 opinions in this case so that we can parse a distinction

1 between your legal analysis from your actual results.

2 So let's start with racially polarized
3 voting. You take racially polarized voting as being
4 specific to each individual election; correct?

5 **MR. SHENKMAN:** Object to the characterization of
6 Dr. Kousser as having made a legal analysis.

7 **THE COURT:** Overruled.

8 **BY MR. MCRAE:**

9 **Q** Do you have the question in mind, sir?

10 **A** I'm sorry. Could you state it again,
11 please?

12 **Q** Okay. Of course.

13 You take racially polarized voting as being
14 specific to each individual election; correct?

15 **A** I make a distinction between two things
16 from my reading of Justice Brennan's opinion in Gingles.
17 One is racially polarized voting, the other is legally
18 significant racially polarized voting.

19 And what I say, after having quoted a
20 significant portion of the Gingles opinion, is that
21 racially polarized voting is specific to each election
22 and legally racially -- legally racialized polar --
23 sorry -- racially polarized voting is a summation across
24 all elections.

25 **Q** And, Dr. Kousser, we're going to get to
26 legally significant racially polarized voting in a
27 second.

28 My question to you specifically, sir, is

1 you take racially polarized voting as being specific to
2 each individual election? That's a yes; right?

3 **A** If it is understood that I am
4 distinguishing between those two uses of racially
5 polarized voting, that is yes.

6 **MR. MCRAE:** Your Honor, can I read from deposition
7 transcript, 104, at line 17 through 20? Page 104,
8 lines 17 through 20.

9 **THE COURT:** Neli, the transcript is where?

10
11 (A discussion was held between Court
12 and clerk, not reported.)
13

14 **THE COURT:** Oh, I misunderstood your question.
15 You said individual election, not location. Or did I
16 misunderstand?

17 **MR. MCRAE:** I said individual election. So the
18 question is: You take racially polarized voting as
19 being specific to each individual election?

20 **THE COURT:** Right. But look at the depo.

21 **MR. MCRAE:** Oh, I'm sorry. Then let me rephrase
22 the question.

23 **THE COURT:** Okay. So --

24 **MR. MCRAE:** Oh, I see. This doesn't have the
25 errata, Your Honor. I understand. So if we turn to the
26 errata, I believe that Dr. Kousser corrected this to be
27 election, as opposed to location, and we can produce the
28 errata.

1 **THE COURT:** Okay. Do you remember, Dr. Kousser,
2 whether you did that?

3 **THE WITNESS:** I think so, but I had three pages of
4 errata.

5 **MR. MCRAE:** Well, Your Honor, maybe I can prove
6 this.

7 **BY MR. MCRAE:**

8 **Q** Why don't we pull up Exhibit 1300 at
9 Page 31, which is your declaration, sir, and why don't
10 we take a look at Paragraph 49 here of your sworn
11 declaration, lines 4 through 7, where you say: "Unlike
12 racially polarized voting, which is specific to each
13 individual election, normal or usual minority loss is a
14 summary measure to be added up after racially polarized
15 voting is computed for all the elections."

16 You see that, sir?

17 **A** Yes.

18 **Q** Okay. So pivoting back to my question --
19 and thank you, Your Honor, for pointing out that
20 discrepancy. We now know that it was an errata.

21 You take racially polarized voting as being
22 specific to each individual election, is the question.
23 And I was going to read -- if we can put up deposition
24 transcript, 104, lines 17 through 20, with the
25 clarification in mind.

26 And you state in paragraph 49 of your
27 declaration that racially polarized voting is specific
28 to each individual election; right?

1 **MR. PARRIS:** Objection, Your Honor. It says what
2 it says, and until there's an errata in front of this
3 Court, it says what it says.

4 **MR. MCRAE:** Okay. Your Honor, if you want me
5 to -- I mean, I've already demonstrated that Dr. Kousser
6 said the word "election" in his declaration. I'm happy
7 to produce the errata.

8 **MR. PARRIS:** I don't have a dispute with that,
9 Your Honor. I just want things to be accurate.

10 **THE COURT:** I'm going to overrule the objection.
11 If you want to write it later, you can write it later.
12 But it seems like it's an error --

13 **MR. MCRAE:** Yes.

14 **THE COURT:** -- in the transcript.

15 **BY MR. MCRAE:**

16 **Q** And you state in Paragraph 49 of your
17 declaration: "Racially polarized voting is specific to
18 each individual election; right?" Answer: "Yes."

19 Now, sir, you opine that there is racially
20 polarized voting with respect to a particular candidate
21 in a particular election whenever there is statistically
22 significant -- whenever there is a statistically
23 significant difference between how different racial or
24 ethnic groups vote for a particular candidate in a
25 particular election; right?

26 **A** That's correct.

27 **Q** And, sir -- I'm sorry, Dr. Kousser, are you
28 reading something up there?

1 **A** I'm just trying to find this general
2 discussion.

3 **Q** Okay. You're trying to find -- I'm not
4 orienting you to a general discussion at this point.
5 I'm just asking you questions.

6 **A** I'm trying to find it so that I will know
7 the context of what you're saying, what you're quoting
8 from.

9 **THE COURT:** You're looking at your declaration; is
10 that it?

11 **THE WITNESS:** Yes.

12 **THE COURT:** Okay. Let him look at it if it's
13 going to help his testimony.

14 **MR. MCRAE:** Very well, Your Honor.

15 **BY MR. MCRAE:**

16 **Q** Sir, your --

17 **THE COURT:** Hold onto the questions. Let him
18 finish.

19 **MR. MCRAE:** I'm sorry?

20 **THE COURT:** Let him finish. Hold on with the
21 questions.

22 **MR. MCRAE:** Oh, okay. I'm sorry.

23 **THE COURT:** Do you need to read something or just
24 refer to it in order to answer the question, I guess
25 is...

26 **THE WITNESS:** If I can quote the sentence before
27 you quoted from my declaration, it's in accord with my
28 answer.

1 It says: "In sum, the level of minority
2 cohesion does not have to be a specific number but
3 merely significant or -- and legally significant White
4 bloc voting has two components; first, the degree of
5 bloc voting that will vary from situation to situation,
6 and second, the normal defeat of candidates favored by
7 cohesive minorities."

8 And then what you quoted: "Unlike racially
9 polarized voting, which is specific to each individual
10 election, normal or usual minority losses, a summary
11 measure to be added up after racially polarized voting
12 is computed for all elections."

13 So that was my understanding. I was just
14 trying to say legally significant is the White bloc
15 voting that defeats usually, and pure, racially
16 polarized voting is exactly what I said, and that's why
17 I answered the question on page 104 as I did.

18 **MR. MCRAE:** Your Honor, that was two questions
19 ago, when we read from the deposition transcript. This
20 was a totally different question. But let me proceed.

21 **BY MR. MCRAE:**

22 **Q** Sir, your definition of "racially polarized
23 voting" that you use in rendering your opinions in this
24 case does not turn on the actual reasons particular
25 voters cast their votes for particular candidates;
26 correct?

27 **A** That is correct, and that's my
28 understanding of what Gingles says quite specifically.

1 **Q** Your definition of "racially polarized
2 voting" is merely concerned with the fact of racially
3 polarized voting, not intent; correct?

4 **A** That is correct.

5 **Q** Now, legally significant racially polarized
6 voting, in your opinion, is racially polarized voting
7 that looks over several elections and is summative;
8 correct?

9
10 (Reporter's interruption for
11 clarification.)

12
13 **MR. MCRAE:** Summative, S-u-m-m-a-t-i-v-e.

14 **THE WITNESS:** I would pronounce it "summative."
15 But you're probably correct.

16 **BY MR. MCRAE:**

17 **Q** Potato, potahto.

18 All right. So you believe that one
19 component of legally significant racially polarized
20 voting is legally significant White bloc voting;
21 correct?

22 **A** Yes.

23 **Q** With respect to legally significant White
24 bloc voting, you understand this to have two components;
25 first, a degree of bloc voting that will vary from
26 situation to situation and, second, the normal defeat of
27 candidates favored by cohesive minorities; correct?

28 **A** Correct.

1 **Q** In the second component, you use the term
2 "cohesive," as we just established; right?

3 **A** Correct.

4 **Q** And you were referring to cohesive voting
5 by the minority when you used that term in the second
6 component; right?

7 **A** Cohesive voting by -- by both. And the
8 definition of "cohesive," certainly from minority
9 voting, is -- it seems to me drawing from the Gingles
10 case, not -- there's no bright line in the cohesive
11 voting of minority -- for minorities that's necessary.
12 And I discuss that in -- when I'm quoting from the
13 Gingles case and then saying what I think it means.
14 Obviously, the Judge can decide whether I'm correct on
15 that, but that's specifically how I used it.

16 **Q** And, sir, and a candidate favored by a
17 cohesive minority is often referred to as a "minority
18 preferred candidate"; right?

19 **A** I don't think those are synonyms. I do not
20 treat them as synonyms.

21 **Q** I said often referred to. I didn't say
22 synonymous.

23 You would agree that a candidate favored by
24 a cohesive minority is often referred to as a minority
25 preferred candidate; correct?

26 **A** But not by me.

27 **Q** Fair enough.

28 You're aware of that; right?

1 **MR. PARRIS:** Objection, Your Honor. It lacks
2 foundation as to who these others are.

3 **MR. MCRAE:** Your Honor, he just said "not by me,"
4 which implies he's aware of other people doing it. I'm
5 merely following up.

6 **THE COURT:** Overruled.

7 **BY MR. MCRAE:**

8 **Q** You're aware that is the term? Cohesive
9 minority is often referred to as -- a candidate favored
10 by a cohesive minority is often referred to as a
11 minority preferred candidate by others. You've heard of
12 that; right?

13 **A** There's a discussion in my declaration of a
14 usage that is like that, from the Kern County case, by
15 an expert for Kern County who actually didn't end up
16 testifying. But he, in a report, says that a -- there
17 is racially polarized voting if and only if a majority
18 of a minority group votes for one particular candidate
19 and a majority of the Anglo group votes for another
20 particular candidate.

21 That seems to me to be wrong. That's a
22 usage that's consistent with what you said. And I give
23 an argument there for why I think that's wrong.

24 **Q** You don't believe that there is any precise
25 percentage of cohesion required in terms of talking
26 about cohesive minorities; right?

27 **A** That's correct.

28 **Q** And you believe that the percentage of

1 cohesion required will depend on characteristics of the
2 electoral structure and the percentage of registered
3 voters comprised by members of the minority group;
4 correct?

5 **A** There are probably other characteristics of
6 a particular election. Justice Brennan mentions the
7 number of candidates and whether it is a free-for-all
8 election or a number post election. There are several
9 characteristics of a particular election that he
10 mentions that could affect a judgment on whether there
11 is minority cohesion.

12 **Q** Let's read from your deposition transcript,
13 page 120, lines 12 through 19. 120, 12 through 19.

14
15 (PAUSE IN THE PROCEEDINGS.)

16
17 **MR. MCRAE:** May I proceed, Your Honor?

18 **THE COURT:** You should probably read through 22 --

19 **MR. MCRAE:** Okay. Let's expand that to 22.

20 **THE COURT:** -- because he's answering the
21 question, "Do you see that?" He says, "yes." So
22 that's --

23 **MR. MCRAE:** That's fine. Totally right, Your
24 Honor. May I proceed?

25 **THE COURT:** Yes.

26 **MR. MCRAE:** (Reading:)

27 **Q** And you say -- you continue to
28 explain that Justice Brennan said that

1 the percentage of cohesion required
2 would depend on characteristics of the
3 electoral structure and the percentage
4 of registered voters comprised by
5 members of the minority group. Do you
6 see that?

7 A Yes.

8 Q Now, all of that -- this
9 recognized that minorities do not always
10 vote cohesively; correct?

11 A Yes.

12
13 **BY MR. MCRAE:**

14 Q Which was my next question. All of this
15 recognizes, sir, that minorities do not always vote
16 cohesively; correct?

17 A Yes.

18 Q Okay. Now, under your definition of
19 "cohesion," a Latino preferred candidate does not need
20 to have a majority of Latino votes; correct?

21 A That's correct.

22 Q And while the required level of minority
23 cohesion may vary from situation to situation, in
24 multiple candidate elections, you take it to be shown if
25 the difference between majority and minority support for
26 a given candidate is statistically significant; right?

27 A That's the -- that's the definition that I
28 use for racially polarized voting.

1 **Q** So that's a "yes"?

2 **A** Can you explain what "it" meant in your
3 question?

4 **Q** What I prefer to do is read page 128,
5 lines 10 through 17 of your deposition.

6 **MR. PARRIS:** Well, Your Honor, I would object. He
7 can't impeach with a deposition.

8 **THE COURT:** True. He hasn't had an answer yet.

9 **MR. MCRAE:** Your Honor, I literally asked this
10 question in the deposition and got an answer. It is
11 impeachment to show that while he was under oath in the
12 deposition, the exact same question was posed with no
13 difficulty, no objections were posed, and I got an
14 answer. That is impeachment.

15 **MR. PARRIS:** Your Honor, if the witness doesn't
16 know what he is referring to and doesn't understand the
17 question, as he is sitting in that chair, in the context
18 of this courtroom, it's incumbent upon him to at least
19 tell him what "it" is.

20 **THE COURT:** Okay. So you have an option. You can
21 ask him to refresh his recollection with a depo and you
22 can point out where he can refresh --

23 **MR. MCRAE:** I will do that.

24 **THE COURT:** -- or you could reask your question,
25 answering his question about what "it" means.

26 **MR. MCRAE:** I will do that.

27 **THE COURT:** All right. So I don't know which
28 option you want to do.

1 **MR. MCRAE:** I will actually do both. I'll make
2 the point that the "it" refers to racially polarized
3 voting. And now --

4 **THE COURT:** Okay. So "it" means racially
5 polarized voting. Can you answer the question then?

6 **THE WITNESS:** If "it" means racially polarized
7 voting, then yes, I do agree.

8 **BY MR. MCRAE:**

9 **Q** Right. Fair enough. Okay.

10 And, sir, we're still talking about what
11 you regard as the two components of legally significant
12 racially polarized voting.

13 Now, with respect to this first component
14 that we're still talking about, as you use degree of
15 bloc voting, it is the equivalent to what you understand
16 to be majority cohesion; correct?

17 **A** I'm sorry. Degree of bloc voting of
18 majorities --

19 **Q** Yes.

20 **A** -- is the same -- is the same as --

21 **Q** Let me show you your deposition to refresh
22 your recollection. Tell me if this refreshes your
23 recollection.

24 **THE COURT:** Well, let him read the depo to
25 himself. That's how you refresh.

26 **MR. MCRAE:** Right. 128 --

27 **MR. PARRIS:** Your Honor, can we not have it up
28 until you --

1 **THE COURT:** Yeah, take it down. Just tell him
2 what part.

3 **MR. MCRAE:** 128, lines 1 through 5.

4 **THE WITNESS:** Yes.

5 **THE COURT:** Before you answer, can you repeat the
6 question so I understand the answer?

7 **MR. MCRAE:** Sure, sure. Yes.

8 **BY MR. MCRAE:**

9 **Q** "With respect to the first component of
10 what you defined as legally significant racially
11 polarized voting, as you use that term, degree of bloc
12 voting, it is the equivalent to what you understand to
13 be majority cohesion; correct?"

14 Does this refresh your recollection that I
15 posed this question and you answered it in the depo?

16 **A** Yes. I'm sure that there is an erratum
17 there for bloc, which in this case is B-L-O-C --

18 **Q** Sir --

19 **A** -- or perhaps I did that throughout every
20 time there's "block" used.

21 **Q** Oh, correct.

22 **MR. MCRAE:** Your Honor, you corrected b-l-o-c-k to
23 b-l-o-c. That's true.

24 **THE WITNESS:** Right.

25 **BY MR. MCRAE:**

26 **Q** Thank you, sir.

27 Does that refresh your recollection that I
28 asked you that question, same question in court, and you

1 answered yes?

2 **A** Okay. Fine, yes.

3 **Q** Okay. And with minority cohesion you
4 cannot assume majority cohesion. It has to be proven;
5 correct?

6 **A** That's correct.

7 **Q** In terms of proving majority cohesion,
8 White minority cohesion, in multiple candidate elections
9 you take it to be shown if the difference in minority
10 and majority support for a particular candidate is
11 statistically significant; correct?

12 **A** Yes.

13 **Q** So your determination about whether there
14 is minority and majority cohesion is dependent upon the
15 standard error and the resulting confidence interval in
16 your estimates of minority and majority support for
17 particular candidates; correct?

18 **A** Correct.

19 **Q** And nothing more, in your view, is required
20 to show minority and majority cohesion than a difference
21 between majority and minority support for a given
22 candidate that is statistically significant, where the
23 standard errors don't overlap; correct?

24 **A** Correct.

25 **Q** So that is the standard you applied in
26 assessing both minority and majority cohesion in
27 reaching your conclusions in this case; correct?

28 **A** Correct.

1 **Q** We're still talking about --

2 **THE COURT:** Can I ask you a question?

3 **MR. MCRAE:** Of course.

4 **THE COURT:** That depends -- what I hear you
5 saying, on any one election, it depends on each
6 candidate?

7 **THE WITNESS:** Yes.

8 **THE COURT:** So we can look at three minority
9 candidates and come up with each candidate, whether
10 there's racially polarized voting or minority and
11 majority cohesion?

12 **THE WITNESS:** Yes. I should point out that you
13 could look at all the candidates separately. You could
14 look at all the elections.

15 For example, if you look at my summary
16 Table 3, I believe, it looks at ten different
17 candidacies, but there are only seven elections. If you
18 look at ten different candidacies, there's racially
19 polarized voting in eight out of ten. If you look at
20 seven elections, there is racially polarized voting in
21 six out of seven. And I don't have a preference on
22 that. You can certainly decide.

23 **THE COURT:** The reason why I'm asking is because
24 there have been elections with multiple Latino
25 candidates --

26 **THE WITNESS:** Yes.

27 **THE COURT:** -- and I think your analysis is as to
28 each candidate in those circumstances, but I'm not a

1 hundred percent sure. That was my recollection.

2 **THE WITNESS:** Yes, that's correct. And I could
3 have done it by adding them all together.

4 **THE COURT:** Okay.

5 **THE WITNESS:** That's certainly one of the things
6 that the C.V.R.A. says.

7 **THE COURT:** Okay. Thank you.

8 **THE WITNESS:** And the results would have been
9 similar. Every time there are -- in the 2012 election,
10 there were three Latino candidates. It's -- there's a
11 statistically significant difference for two of them out
12 of the three, Mr. Duron and --

13 **THE COURT:** I remember that. That's what I'm
14 thinking of.

15 **THE WITNESS:** Yes. And if you added them all
16 together -- I have not done this -- but I'm quite
17 certain that you will find statistically significant
18 difference between the vote for all the Latino
19 candidates, between Latinos and non-Hispanic Whites.

20 **THE COURT:** So you're saying with three candidates
21 there may have been one who didn't suffer from this
22 racially polarized voting, but if you aggregated them,
23 it would show racially polarized voting?

24 **THE WITNESS:** Yes, I'm sure that that's the case.
25 And I could do it or Professor Lewis could do it. I'm
26 sure that when he testifies, he could add them all
27 together.

28 **MR. MCRAE:** Your Honor, to be clear, Professor

1 Lewis has already testified by deposition in this case.
2 He would not say that there's racially polarized voting.
3 I just want to be clear about that part, to the extent
4 that the question -- the response of Dr. Kousser implied
5 that. But, of course, you'll hear from Dr. Lewis
6 himself.

7 **MR. PARRIS:** That's inaccurate, Your Honor, but
8 Dr. Lewis will testify and will say exactly what he said
9 in his deposition, I hope.

10 **THE COURT:** Okay. Well, we'll see what he says.
11 That's for later.

12 **MR. MCRAE:** Thank you.

13 **THE COURT:** All right.

14 **MR. MCRAE:** Thank you, Your Honor. May I proceed?

15 **THE COURT:** Yes.

16 **BY MR. MCRAE:**

17 **Q** Okay. So, sir, we're still talking about
18 the components of legally significant racially polarized
19 voting, as far as your understanding of them. And we're
20 going to focus now on the second component, the normal
21 defeat of candidates favored by cohesive minorities.

22 Now, in your view, what you do there is
23 that adds up all of the elections and says whether it
24 amounts to the normal defeat of candidates favored by
25 cohesive minorities; correct?

26 **A** Yes.

27 **Q** And in rendering your opinions, you took
28 the position that racial polarization and whether

1 candidates normally lose are two separate things and
2 they should be added up separately; correct?

3 **A** Yes.

4 **Q** Now, in this case, in formulating your
5 opinion that there was legally significant racially
6 polarized voting, you looked at voting with respect to
7 Latino surnamed candidates; right?

8 **A** Correct.

9 **Q** But there is nothing that would prevent a
10 minority-preferred candidate that is a candidate
11 preferred by a cohesive minority from being a
12 nonminority; right?

13 **A** That's correct.

14 **Q** In fact, in other voting cases you've taken
15 the position that a minority-preferred candidate can be
16 a nonminority; right?

17 **A** Only if there are too few minority
18 candidates running to make a judgment about whether
19 there was racially polarized voting.

20 **Q** You testified in a case called Garrett v.
21 City of Highland; right?

22 **A** That's correct.

23 **Q** Garrett v. City of Highland was a
24 California Voting Rights Act case; right?

25 **A** Correct.

26 **Q** Garrett v. City of Highland involved a
27 multiseat -- multiseat elections for the City of
28 Highland city council; right?

1 **A** Correct.

2 **Q** You testified about racially polarized
3 voting in the Garrett v. City of Highland case; right?

4 **A** Correct.

5 **Q** One of the instances you testified about in
6 the Highland case in which you said there was racially
7 polarized voting was the 2004 city council election in
8 the City of Highland; right?

9 **A** Yes.

10 **Q** That election, the 2004 city council
11 election, was a two-seat election; correct?

12 **A** That's correct.

13 **Q** And in the Highland case, you looked at two
14 candidates in the two-seat election with respect to whom
15 you concluded that voting was racially polarized; right?

16 **A** That's correct.

17 **Q** And you said that there were two candidates
18 who Latinos overwhelmingly voted for; right?

19 **A** Yes.

20 **Q** One of those individuals was a person by
21 the name of Mr. Mejia, M-e-j-i-a; right?

22 **A** Yes, I think that's correct.

23 **Q** Now, in that Highland case you testified
24 that Mr. Mejia received 33 percent of Latino votes;
25 right?

26 **A** Yes.

27 **Q** Mr. Mejia only received 8 percent of the
28 non-Hispanic White and Black votes combined; correct?

1 **A** Yes.

2 **Q** Mr. Mejia lost the city council election in
3 Highland, though; right?

4 **A** Yes.

5 **Q** The other individual you looked at in the
6 2004 city council election in the Highland case was a
7 Ms. Braggs; correct?

8 **A** I'm sure that you're correct. I don't
9 remember offhand.

10 **Q** Maybe I can refresh your recollection.
11 Why don't we take a look at Exhibit 1319.

12

13 (Exhibit 1319, marked.)

14

15 **MR. MCRAE:** Don't publish it, please. I just want
16 to make sure the witness has an opportunity to look at
17 it.

18 Your Honor, can I ask this question?

19 **THE COURT:** Yes.

20 **MR. MCRAE:** I don't know -- I could hand it to the
21 witness, but I'm curious, is it okay if we just --

22 **THE COURT:** You can turn off mine. Can you turn
23 off my screen and just I can do with this?

24 **MR. MCRAE:** We can't do that. Okay, I'm sorry.
25 I was going to try to just do it on screen there.

26 **THE COURT:** You know, I don't have to look at it
27 (indicating).
28

(Laughter.)

MR. MCRAE: Okay. Fair enough. Okay. That works.

THE COURT: Go ahead. Just put it up.

THE WITNESS: You don't have to look at all 20 tables anyway.

BY MR. MCRAE:

Q Okay. Take Exhibit 1319, and let's go to page 27 of that exhibit. And why don't you just go ahead and read, sir? I can direct you to line 12 of this transcript.

Again, just tell me whether or not that refreshes your recollection that the individuals that you described as being overwhelmingly voted for by the Latino population in that case were Mr. Mejia and Ms. Braggs. Does that refresh your recollection?

Do you see that?

A Yes.

Q Okay.

You can take that down. Thanks.

Now, Ms. --

A If I could explain why I considered Ms. Braggs here.

THE COURT: Just let him ask the next question.

THE WITNESS: Okay.

BY MR. MCRAE:

Q Thank you. Now, Ms. Braggs received

1 51 percent of the Latino votes in that election; right?

2 **A** Let's make sure that we understand what
3 denominator I was using. I was using the percentage of
4 votes for the city council, not the percentage of votes
5 people who voted on that day.

6 **MR. MCRAE:** Your Honor, let's take a look at the
7 deposition transcript, 323, lines 9 through 11.

8 **THE COURT:** Okay. Then I've got to get the second
9 volume out.

10 **MR. MCRAE:** Of course.

11 **MR. PARRIS:** Counsel, perhaps if you would tell us
12 the number so we could look at it, and then if we don't
13 have an objection, ask the Court to look at it.

14 **MR. MCRAE:** I just did.

15 **MR. PARRIS:** That's not quite how you did it.

16 **THE COURT:** I think he gave -- 323, what?

17 **MR. MCRAE:** Lines 9 through 11.

18 **THE COURT:** That's the right way to do it.

19 **MR. MCRAE:** Yes, it is.

20 **THE COURT:** So if I don't hear an objection from
21 the plaintiffs, I'll allow him to read it.

22 **MR. SHENKMAN:** No objection.

23 **MR. MCRAE:** Okay. Let's go ahead, put it up.

24 Looking at line 9 through 11 on Page 323 of
25 your deposition transcript:

26 Q Ms. Braggs received 51 percent
27 of the Latino votes; correct?

28 A Yes.

1 **BY MR. MCRAE:**

2 **Q** Okay. But Ms. Braggs only received
3 12 percent of the non-Hispanic White and Black votes
4 combined; correct?

5 Dr. Kousser?

6 **A** Yes.

7 **Q** Sir?

8 **A** Yes.

9 **Q** You're answering yes?

10 **A** I answered yes and I'm answering yes now.

11 **Q** Oh, okay. I -- that's fine. Sir, you can
12 turn that over.

13 **A** Okay.

14 **MR. PARRIS:** You can refer to anything you want
15 while you're testifying.

16 **THE WITNESS:** Right.

17 **THE COURT:** Counsel, don't give him any direction
18 from the counsel table. Okay?

19 **MR. PARRIS:** I apologize, Your Honor. Counsel
20 seems to be directing him not to be able to look at
21 whatever he wants to look at as he's testifying. That
22 is not --

23 **THE COURT:** If he needs to look at it, he can ask.
24 If he needs to refresh recollection, he can ask. But
25 technically he should just turn it over and not look at
26 it until there's confusion. So ...

27 **MR. MCRAE:** Thank you.

28 **THE COURT:** If there's something you need to look

1 at, you can let us know. Something that can refresh
2 your recollection, you can ask us, but just keep it
3 aside for now.

4 **THE WITNESS:** Thank you. Okay.

5 **MR. MCRAE:** All right. Your Honor, can I walk
6 over and look at the monitor?

7 **THE COURT:** Yes.

8 **MR. MCRAE:** I forgot what the last question and
9 answer was.

10 **THE COURT:** Something about 12 percent of
11 non-Hispanic votes.

12 **MR. MCRAE:** I got an answer to that?

13 **MS. MOSHELL:** Uh-huh, the last one.

14 **MR. MCRAE:** I did. I just wanted to make sure I
15 had an answer to the question. Thank you.

16 **BY MR. MCRAE:**

17 **Q** And Ms. Braggs lost the city council
18 election in Highland; correct?

19 **A** Yes.

20 **Q** And in the Highland case you said that the
21 two candidates who were the White-preferred candidates
22 got overwhelming support from Whites but very little
23 support from Latinos; right?

24 **A** Yes.

25 **Q** And both of those individuals who were
26 supported by the White community that were the
27 White-preferred candidates in the Garrett case won;
28 right?

1 **A** Yes.

2 **Q** Now, Mejia is a Latino surname; right?

3 **A** Yes.

4 **Q** Braggs is not a Latino surname; right?

5 **A** That's correct.

6 **Q** Yet the fact that Mejia is a Latino surname
7 and Braggs is not a Latino surname didn't make any
8 difference to your racially polarized voting analysis in
9 the Garrett case, did it?

10 **A** The reason that I looked at the Braggs vote
11 was that there were so few Latino candidates that I had
12 to look at other candidates who were not Latino. That's
13 why I did it. Otherwise I would not have looked -- if
14 there had been more Latino candidates, I wouldn't have
15 looked at Braggs.

16 **Q** My question is, sir -- why don't we look at
17 Page 324, lines 10 through 15, of your deposition.
18 Page 324, lines 10 through 15, of your deposition.

19

20 (PAUSE IN THE PROCEEDINGS.)

21

22 **MR. MCRAE:** Your Honor, may I?

23 **THE COURT:** Through what line?

24 **MR. MCRAE:** It's lines 10 through 15.

25 **THE COURT:** Why don't you read through 18.

26 Actually read through 21.

27 **MR. MCRAE:** I'm sorry, Your Honor. What did you
28 say?

1 **THE COURT:** Read through 24.

2 **MR. MCRAE:** I will do that, Your Honor. Thank
3 you.

4 Can we have it up on the screen?

5 Okay. So starting at Page 324, at --

6 **THE COURT:** Ten is fine.

7 **MR. MCRAE:** At line 10, 324. Thank you.

8 (Reading:)

9 "And the fact that Mejia is a
10 Latino surname and Braggs is not a
11 Latino surname didn't make any
12 difference to your racially polarized
13 voting analysis in the Garrett case;
14 correct?

15 A That's -- that seems to be
16 what I testified to.

17 Q And in fact a Latino-preferred
18 candidate does not have to be Latino;
19 correct?

20 A That's certainly the case,
21 yes.

22 Q And a Latino-preferred
23 candidate does not have to be Latino
24 surnamed; correct?

25 A Of course.

26 Q And in fact a Latino-preferred
27 candidate could be named Johnson or
28 Smith; right?

1 A Could be.

2

3 **BY MR. MCRAE:**

4 Q Now, sir --

5 **MR. PARRIS:** Your Honor, how is that impeachment?
6 That's what he said.

7 **THE COURT:** Well, then, object if you think it's
8 not impeachment. But you didn't object to it.

9 **MR. PARRIS:** That's correct, Your Honor.

10 **THE COURT:** He gives you the page and line.

11 **MR. PARRIS:** The problem I'm having is we're
12 missing some of the transcript. We're printing it out
13 now. That's why we're...

14 **THE COURT:** Okay. On redirect you can do that.

15 **MR. PARRIS:** Thank you. Thank you.

16 **BY MR. MCRAE:**

17 Q Now, sir, you did not express --

18 I'm sorry, Your Honor, may I proceed?

19 **THE COURT:** Yes.

20 **MR. MCRAE:** Thank you.

21 **BY MR. MCRAE:**

22 Q Sir, you did not express any opinions in
23 this case about whether Latinos in Santa Monica can form
24 a majority-minority district in any part of
25 Santa Monica; correct?

26 A Correct.

27 Q Now, David Ely provided the data for your
28 racially polarized voting analysis; right?

1 **A** Yes.

2 **Q** There is no reason, in your view, to doubt
3 the demographic data David Ely provided to you; right?

4 **A** Correct.

5 **Q** So there is no precinct in Santa Monica in
6 which Latinos constitute more than 40.7 percent of
7 actual voters; correct?

8 **A** Correct.

9 **Q** You were not aware of any precinct in
10 Santa Monica in which African-Americans constitute more
11 than 27 percent of actual voters; correct?

12 **A** Correct.

13 **Q** You were not aware of any precinct in
14 Santa Monica in which Asian Americans constitute more
15 than 8 percent of actual voters; correct?

16 **A** I believe that's correct.

17 **Q** And, sir, in the course of your career,
18 you've seen instances in which packing a district with
19 all of the locality's high minorities areas had a
20 negative effect on the voting strength of minorities
21 living outside of that particular district; correct?

22 **A** Yes. Certainly in Texas that's the case.

23 **Q** Now, sir, for an analysis of whether there
24 was racially polarized voting in Santa Monica, the
25 plaintiffs' counsel asked you to analyze city council
26 elections in Santa Monica; right?

27 **A** Correct.

28 **Q** You were asked by the plaintiffs' counsel

1 in this case to analyze elections with Latino or
2 Spanish-surnamed candidates; right?

3 **A** Yes.

4 **Q** And you thought all of the Latino city
5 council candidates had Spanish surnames because
6 plaintiffs' counsel told you that that was the case;
7 correct?

8 **A** They told me that the candidates were
9 considered -- considered Latino. So it's not simply
10 Spanish surname, it's ones that voters consider to be
11 Latino.

12 **Q** Let's take a look at page 13, lines 11
13 through 23 of your deposition transcript. Page 13,
14 lines 11 through 23.

15
16 (PAUSE IN THE PROCEEDINGS.)

17
18 **MR. MCRAE:** May I?

19 **THE COURT:** Yes, you may.

20 **BY MR. MCRAE:**

21 **Q** At line 11 on page 13 (reading):

22 "And you said 'Latino or Spanish
23 surname candidates.' Were you saying or
24 Latino-surnamed candidates to clarify
25 the type of candidates, or was that a
26 deliberate use of a conjunction to
27 express two different groups?"

28 That was the question.

1 A My understanding was that all
2 of the Latino candidates were Spanish
3 surname.

4 Q And what -- and your
5 understanding was based on what?

6 A What the counsel told me.

7 Q And counsel, meaning counsel
8 for the plaintiffs in this case?

9 A That's correct.

10

11 **BY MR. MCRAE:**

12 Q Sir, specifically Kevin Shenkman told you
13 all of the Latino candidates on the city council had
14 Spanish surnames; correct?

15 A Yes.

16 Q Okay. Your analysis of city council
17 elections in this case started in 1994 and continued up
18 until 2016; correct?

19 A The 1994 elections I actually was not
20 working on in 1994.

21 Q That is a precise use of the language, sir.
22 Thank you. Let me be precise. I did not mean to imply
23 that you started working on this case in 1994.

24 What I meant to say was that your analysis
25 of city council elections in this case relative to those
26 elections that you examined span in a period starting in
27 1994 and continued up until 2016; correct?

28 A Correct.

1 **Q** You did not start your analysis of
2 elections starting before 1994 because there was no data
3 on Spanish surnames before 1994; correct?

4 **A** Correct.

5 **Q** You analyzed seven city council elections
6 from 1994 to 2016; correct?

7 **A** Through 2016, yes.

8 **Q** Yes, thank you.

9 You also analyzed the 1946 referendum that
10 you described in your direct examination; correct?

11 **A** Yes.

12 **Q** And you also analyzed the 1975 referendum;
13 right?

14 **A** Correct.

15 **Q** And by 1975 referendum, for the record I
16 mean in Santa Monica. Right?

17 **A** Yes.

18 **THE COURT:** What was the other referendum?

19 **MR. MCRAE:** Thank you, Your Honor.

20 **BY MR. MCRAE:**

21 **Q** A 1946 referendum in Santa Monica; right,
22 Dr. Kousser?

23 **A** Yes. And the Proposition 11 referendum
24 just using the Santa Monica votes.

25 **Q** Now, sir, you did not do a statistical
26 analysis of any other elections other than what we've
27 discussed here during your cross-examination; correct?

28 **A** Yes.

1 **Q** Your analysis of the 1946 and 1975
2 referendums in Santa Monica was in connection with your
3 opinions regarding discriminatory intent; correct?

4 **A** Correct.

5 **Q** Your analysis of the 1946 and 1975
6 Santa Monica referendums was not in connection with your
7 opinions regarding racially polarized voting; correct?

8 **A** Correct.

9 **Q** So with respect to racially polarized
10 voting, you analyzed only ten city council candidacies
11 in seven city council elections between 1994 and 2016;
12 right?

13 **A** Yes.

14 **Q** You did not consider analyzing any other
15 elections other than the city council elections and the
16 two referendums in 1946 and 1975 in rendering your
17 analysis in this case; correct?

18 **A** Yes.

19 **Q** Now, in general, statisticians today favor
20 King's ecological inference; correct?

21 **A** They have, but they have not confronted
22 the -- the possibility that they should model
23 multicandidate, multioffice elections differently. All
24 of the analyses using King's E.I. that I've ever seen
25 until Jeff Lewis did it in this case have been of
26 elections where the denominator was the votes in that
27 particular context.

28 **Q** Sir --

1 **A** I don't know that it has been faced -- that
2 particular question has been faced before this case.
3 I'm unaware of what the usual procedures are.

4 **Q** Fair enough. And I'm just looking at the
5 monitor because I needed to consult something.

6 I couldn't help but notice that my question
7 was, "Now, in general, statisticians today favor King's
8 ecological inference; correct?" And you started by
9 saying, "They have, but ..." So I just want to make
10 sure I have a clear understanding of what you're saying.

11 In response to my specific question, you
12 agree that statisticians today favor King's ecological
13 inference in doing statistical analysis; correct?

14 **A** I'm sorry, I tried to explain that my
15 knowledge of whether they favor it or not has been in
16 elections using a denominator of the proportion in --
17 I'm sorry -- of the votes in that election so that
18 everything would add up to 100 percent. That's as far
19 as my knowledge goes.

20 I don't know what -- I don't know what the
21 standard procedures are and what statisticians favor in
22 elections like the multicandidate elections with voters
23 having more than one choice, where the denominator could
24 be 300 percent or 400 percent.

25 **MR. MCRAE:** Your Honor, can I have a moment? I
26 need to consult a deposition transcript.

27 **THE COURT:** Okay. Let's take a break.

28 **MR. MCRAE:** Okay. We can do that.

1 **THE COURT:** We haven't yet.

2 **MR. MCRAE:** Thank you. Sorry, Your Honor. What
3 time to come back?

4 **THE COURT:** 11:30. We only have half an hour to
5 finish.

6 **MR. MCRAE:** Thank you.

7

8 (Recess.)

9

10 **THE COURT:** Pico Neighborhood Association versus
11 City of Santa Monica, BC616804. Okay. You can
12 continue.

13 **MR. MCRAE:** Thank you, Your Honor.

14 **BY MR. MCRAE:**

15 **Q** Sir, at the break I had asked you whether
16 statisticians today favor King's ecological inference
17 and you gave an answer.

18 Your Honor, I'd now like to read from the
19 witness's deposition. It's page 60, lines 12 -- page
20 60, line 12, through page 61, line 11.

21

22 (PAUSE IN THE PROCEEDINGS.)

23

24 **MR. MCRAE:** May I proceed, Your Honor?

25 **THE COURT:** Hold on a minute.

26 **MR. MCRAE:** Sure.

27 **MR. PARRIS:** Could you put it on our screen,
28 please, so we could see -- we don't have the transcript.

1 **MS. MOSHELL:** I have a copy.

2 **MR. MCRAE:** Here you go.

3 Your Honor, we're going to give them copies
4 of the transcripts.

5 **THE COURT:** Okay.

6 **MR. MCRAE:** So just to repeat it so counsel can
7 look at it as well, page 60, line 12, through page 61,
8 line 11.

9
10 (PAUSE IN THE PROCEEDINGS.)

11
12 **MR. MCRAE:** May I proceed?

13 **THE COURT:** You may.

14 **MR. MCRAE:** Okay. Thank you. So, question,
15 page 60 line 12:

16 "Now, this analysis that you -- or
17 rather the conclusions that you reach,
18 you did this statistical analysis using
19 ecological regression and ecological
20 inference; is that right?

21 "Yes," is the answer.

22 Q And any opinion as to which
23 one was better in that particular
24 exercise?

25 A Since it's just -- since
26 everybody has just one vote, probably
27 ecological inference is better.

28 Q And why is that?

1 A Because it has the -- it makes
2 use of the information that is in the
3 bounds, as Jeff Lewis points out and
4 also you point out in my report the use
5 of -- instead of using a procedure which
6 is -- which is based upon a distribution
7 and simply a calculation, it's based
8 upon running large numbers of
9 simulations.

10 And so in general, statisticians
11 these days favor the latter procedure or
12 those latter procedures that are based
13 upon such things. It's possible to do
14 that now because we have high-speed
15 computers. And when statistics was
16 developing in the Twentieth Century, for
17 most of it we didn't have high-speed
18 computers and everything had to be
19 calculated by hand or using calculators.

20
21 **BY MR. MCRAE:**

22 Q Sir, but you believe that ecological
23 regression is superior in this case to King's ecological
24 inference as a measure of voting -- as a measure of
25 voting patterns in this particular case; right?

26 A As a matter -- as a measure of voting
27 patterns in the city council races, that was a reference
28 to the 1946 referendum. And I specifically said

1 everybody has just one vote.

2 My discussion subsequent to that was in
3 terms of that election where everybody just has one
4 vote. And I agree certainly that ecological inference
5 is better in that situation.

6 I argued in the report why ecological
7 regression is preferable in the multicandidate
8 elections, but I gave you both of the ways of analyzing
9 things.

10 So Appendix A uses ecological regression,
11 unweighted and weighted, with the denominator of all
12 voters, and Appendix B gives you unweighted and weighted
13 ecological regression and ecological inference with the
14 denominator being the number of people who voted in just
15 the city council elections.

16 So you have everything. Ecological
17 inference is better in elections where you have just one
18 vote. I argued that it was inferior in elections where
19 you have more than one vote, but I gave you all of the
20 results both ways.

21 **Q** Sir, focusing on my specific question, you
22 believe ecological regression is superior to King's
23 ecological inference as a measure of voting patterns in
24 this particular case; true or false?

25 **A** In the -- for analyzing the city council
26 elections --

27 **Q** Thank you.

28 **A** -- yes.

1 **Q** And that is because you believe that to use
2 King's ecological inference model, you have to have
3 election returns and ethnic group percentages that do
4 not sum to above 100 percent; correct?

5 **A** Yes. I can explain that if you would like
6 to have me explain that.

7 **Q** I don't need that. I don't know if the
8 Court wants that. I don't need it.

9 **THE COURT:** No, I understand it. I think we're
10 okay.

11 **BY MR. MCRAE:**

12 **Q** Okay. So you believe that ecological
13 regression is better here because you believe it allows
14 the modeling of cases in which voters have more than one
15 vote that they can possibly cast and ecological
16 inference doesn't allow for that; correct?

17 **A** Yes, because ecological inference is based
18 upon a bounded normal curve, n-o-r-m-a-l, a bounded
19 normal curve that restricts the results to be from zero
20 to 100 percent.

21 **Q** Sir --

22 **A** There is some discussion of that in
23 Jeff Lewis' report. And he says that ecological
24 inference doesn't exactly work right in the situation
25 with multiple candidates where you've got a denominator
26 of -- which can add to 300 to 400 percent, because you
27 can occasionally at least get results that are outside
28 the zero and one bounds.

1 And since getting results that are outside
2 the zero and one bounds is something that is prohibited
3 by ecological inference, that seemed to me to be argued
4 for using something where you expect that from time to
5 time results can be outside the zero, one bounds; that
6 is, ecological regression.

7 **Q** In this case, sir, you found that eight
8 election contests out of ten involving Latino-surnamed
9 candidates were racially polarized using both unweighted
10 and weighted ecological regression with the total number
11 of voters as the denominator; correct?

12 **A** Yes.

13 **Q** And you believe that using weighted
14 ecological regression with the total number of voters as
15 the denominator is the most accurate method for this
16 case; correct?

17 **A** Yes.

18 **Q** And when you say these eight out of ten
19 election contests involving Latino-surnamed candidates
20 were racially polarized, you are saying, using your
21 definition of that term, that in these eight election
22 contests your weighted ecological regression analysis
23 showed a statistically significant difference between
24 how Latinos and non-Hispanic Whites voted for the eight
25 Latino-surnamed candidates; right?

26 **A** Correct.

27 **Q** In this case you also found that six
28 election contests out of ten involving Latino-surnamed

1 candidates were racially polarized under ecological
2 inference; correct?

3 **A** With a different denominator. Jeff Lewis
4 found seven. There was one contest -- I looked at his
5 Excel sheet today, and if you look at the four variable
6 ecological inference in his Excel sheet, the 2016
7 contest for Vazquez is also racially polarized.

8 **Q** Do you recall me asking you that very
9 question in your deposition and the only answer you
10 provided was "yes"? Do you recall that?

11 **A** No, I don't.

12 **Q** Okay.

13 **A** But I'm sure -- I suspect that I would have
14 given that. So I supplemented it today. I got up early
15 this morning so that I could look at Jeff Lewis' Excel
16 sheet.

17 **Q** Let's look at your answer to the deposition
18 transcript. Page 49, lines 23, through 50, line 9.
19 Page 49, line 23, to Page 50, line 9.

20
21 (PAUSE IN THE PROCEEDINGS.)

22
23 **MR. MCRAE:** May I, Your Honor?

24 **THE COURT:** Hold on a second.

25 **MR. MCRAE:** Sure.

26 **THE COURT:** Do you want to read through line 9?

27 **MR. MCRAE:** Yes.

28 **MR. PARRIS:** Your Honor, he can read it, but I

1 don't see how it's impeachment.

2 **MR. MCRAE:** Your Honor, the reason it's
3 impeachment, just like with many of Dr. Kousser's other
4 answers are, is when you testify under oath, and
5 particularly if you provide monosyllabic responses to
6 questions and then you start adding all sorts of things
7 to your questions and qualifying them and injecting
8 other points, that is inconsistent testimony.

9 That is impeachment because it shows, in
10 other words, situational answering. In one context you
11 answer a question simply without qualification, without
12 trying to equivocate or to dodge, and then in another
13 context you're trying to, for whatever reason, add
14 things to it. That's impeachment.

15 **MR. PARRIS:** Your Honor, I would disagree with
16 that. I think that we all answer questions in the
17 context that we're in. And we don't know the questions
18 before that -- what -- that took place before this or
19 the -- or anything else.

20 We answer questions in the context we're
21 in. And if it's not contrary to what he said in the
22 deposition, it's not impeachment.

23 If he wants to read it, he can read it, but
24 I don't know why we're doing it.

25 **MR. MCRAE:** Your Honor, impeachment is not limited
26 to contrary --

27 **THE COURT:** Overruled. You can read it.

28 **MR. MCRAE:** Thank you.

Page 49, line 23:

"And you also say, at Pages 5 and 6, paragraph 10 of your declaration, that if we use total votes in the city council -- " next page, please " -- election as the denominator, which ignores the fact that voters could cast ballots for more than one candidate, the same elections are polarized in eight of ten elections using E.R. but only in six of ten of using E.I. This is one of the conclusions you reach?

A Yes.

BY MR. MCRAE:

Q And, sir, when you say E.I. in that answer, E.I. is ecological inference?

A Yes.

Q Okay. Now, sir --

Your Honor, I need a moment.

THE COURT: Yes.

MR. MCRAE: I'm trying to remember exactly.

BY MR. MCRAE:

Q And, sir, when you say these six out of ten election contests involving Latino surname candidates were racially polarized, you are saying, using your definition of the term, that in these six election contests your ecological inference analysis showed a

1 statistically significant difference between how Latinos
2 and non-Hispanic Whites voted for the six Latino surname
3 candidates; correct?

4 **A** Yes.

5 **Q** And one factor that prompts you to believe
6 Latino voters cohesively supported Latino surname
7 candidates in this analysis you did is that in six of
8 the ten contests at least two-thirds of the Latino
9 voters were estimated to have cast a vote for Latino
10 contestant; right?

11 **A** That's -- it was simply an observation.
12 Simply a summative observation.

13 **Q** So that's a "yes"?

14 **MR. PARRIS:** No, Your Honor. It's his answer. He
15 cannot put answers into his mouth.

16 **THE COURT:** Overruled. This is cross.

17 **THE WITNESS:** Really, that's -- it doesn't add
18 anything to know that except it's just a summation of
19 the results.

20 **MR. MCRAE:** I'd like to read from the witness'
21 deposition, page 51, lines 7 through 12.

22 **MS. MOSHELL:** 13.

23 **MR. MCRAE:** To 13, excuse me. 51, lines 7 to 13.

24 **MR. PARRIS:** Your Honor, it's not impeaching.

25 **THE COURT:** Overruled.

26 **MR. MCRAE:** Thank you. Question, Line 7, page 51:

27 "In page 6, paragraph 10, you say,
28 in these ten election contests, Latino

1 voters cohesively supported Latino
2 candidates. Did you read that -- did
3 you reach that conclusion based on your
4 opinion that in six of the ten at least
5 two-thirds of the Latino voters are
6 estimated to have cast a vote for a
7 Latino contestant?

8 A That certainly is one factor.

9
10 **BY MR. MCRAE:**

11 Q Now, sir, another basis on which you
12 reached the conclusion that Latino voters cohesively
13 supported Latino-surnamed candidates would be if the
14 results were similar to the ones in which two-thirds of
15 the Latino voters cast a vote for a Latino contestant;
16 right?

17 A I'm sorry, I didn't follow that.

18 Q That's okay. Let me try that again.

19 Another basis on which you reach the
20 conclusion that Latino voters cohesively supported
21 Latino-surnamed candidates would be if the results were
22 similar to the ones in which two-thirds of Latino voters
23 cast a vote for a Latino contestant; correct?

24 **MR. SHENKMAN:** Objection. Vague and ambiguous. I
25 don't understand the question.

26 **THE COURT:** Sustained.

27 **THE WITNESS:** I don't understand the question, I'm
28 sorry.

1 **THE COURT:** It's a little vague.

2 **BY MR. MCRAE:**

3 **Q** Okay. Sir, do you recall me asking you in
4 your deposition whether there were other bases for your
5 conclusion in this case that Latino voters voted
6 cohesively, and one of the things that you mentioned to
7 me was, "If there are other elections where the results
8 are similar to the ones I discuss here, then that would
9 play a role in my statement." Do you recall saying
10 that?

11 **MR. PARRIS:** It's compound. There's three things
12 in that question.

13 **MR. MCRAE:** I'm asking if he recalled saying that.

14 **THE COURT:** That's improper refreshing
15 recollection if you're trying to have him recall
16 something.

17 **MR. MCRAE:** Okay. Can I show him something to see
18 if that refreshes his recollection?

19 **THE COURT:** Yes. That's the proper way to do it.

20 **MR. MCRAE:** Without publishing, we'll do that.

21 **THE COURT:** If you want to put it up --

22 **MR. PARRIS:** Your Honor, we don't have an
23 objection to you looking at it.

24 **MR. MCRAE:** Okay.

25 **THE COURT:** Well, maybe they do. I don't know.

26 **BY MR. MCRAE:**

27 **Q** It's page 53, sir, lines 4 through 13.
28 Page 53, lines 4 through 13. And I just need you to

1 read it long enough to tell me if that refreshes your
2 recollection that you told me that another basis in
3 which you thought Latino voters cohesively supported
4 Latino candidates would be, "If there are other
5 elections where the results are similar to the ones that
6 I discuss here, then that would play a role in that
7 statement."

8 **MR. PARRIS:** Your Honor, for him to sneak in
9 reading what he thought it said rather than does it
10 refresh his recollection as to what is the question --

11 **THE COURT:** It's improperly refreshing
12 recollection.

13 **MR. MCRAE:** Okay.

14 **THE COURT:** Just have him read the answer, then --
15 read the depo, then you could reask the question but not
16 the question is this what the depo says. That's
17 improper.

18 **MR. MCRAE:** Sorry about that. Sorry about that,
19 Your Honor. I'll reask the question.

20 **THE COURT:** And the question isn't is that what
21 the depo says.

22 **MR. MCRAE:** Correct. Totally understand that. My
23 apologies.

24 **BY MR. MCRAE:**

25 **Q** All right. Sir, my question to you is
26 isn't it true that another basis on which you reach the
27 conclusion that Latino voters cohesively supported
28 Latino-surnamed candidates would be if the results were

1 similar to the ones in which two-thirds of Latino voters
2 cast a vote for a Latino contestant?

3 Dr. Kousser?

4 **A** I'm trying to recall the context of this
5 whole discussion and it's a little difficult for me.

6 **Q** But you do recall telling me that?

7 **MR. PARRIS:** Again, Your Honor, you just --

8 **THE WITNESS:** I just read it.

9 **MR. PARRIS:** You just instructed him that's not
10 the way.

11 **THE COURT:** Yeah. True.

12 **MR. MCRAE:** Your Honor, I'm sorry. I really tried
13 to stay within what you were saying. When he said I'm
14 trying to understand the context of that, I understood
15 that to mean that he's saying, oh, I remember saying it
16 but I don't remember the context, which is why I --

17 **THE COURT:** Well, you're putting words in his
18 mouth. That's not what he said.

19 **MR. MCRAE:** Okay. So --

20 **THE COURT:** I'm going to strike your question.

21 **MR. MCRAE:** Okay.

22 **BY MR. MCRAE:**

23 **Q** So let me start again. Let me hit the
24 reset button here.

25 You've had a chance to look at the
26 deposition transcript, sir?

27 **A** Parts of the deposition transcript, I mean.

28 **Q** Okay, right. And does that refresh --

1 sorry.

2 Let me now ask you the question: Another
3 basis on which you reach the conclusion that Latino
4 voters cohesively supported Latino surname candidates
5 would be if the results were similar to the ones in
6 which two-thirds of Latino voters cast a vote for a
7 Latino contestant; right?

8 **A** That is in the transcript, yes. So I must
9 have said that.

10 **Q** Thank you. Sir, there are no other bases
11 on which you conclude that Latino voters cohesively
12 supported Latino surname candidates in the Santa Monica
13 city council elections; correct?

14 **A** What I was referring to --

15 **MR. PARRIS:** Your Honor, if I may, it's
16 misleading. The question was --

17 **THE COURT:** Well, then you can redirect him.

18 **MR. PARRIS:** Okay.

19 **THE WITNESS:** What I was referring to -- what I
20 thought I was referring to throughout was the results
21 that found eight out of the ten elections in table 3,
22 six out ten elections in table 4, were racially
23 polarized.

24 A summary overview of that said -- noticed
25 that two-thirds of Latinos voted for the Latino
26 candidates.

27 As the deposition went on, what was in my
28 mind was the original tables. What you seem to be

1 referring to now is simply the summary that two-thirds
2 voted in one particular way.

3 I'm not trying to be evasive. My
4 conclusion was based upon the racial polarization in
5 each of the elections. And the two-thirds is a useful
6 summary of that, but that's what it is.

7 **MR. MCRAE:** Your Honor, I'd like to read from
8 page 53, line 4 through line 15.

9 **THE COURT:** 53, line 4 through?

10 **MR. MCRAE:** Line 15.

11 **THE COURT:** Okay.

12 **MR. PARRIS:** Your Honor, the reason it's not
13 impeachment is because it starts out with "any other
14 bases."

15 **THE COURT:** Okay. Where are you looking?

16 **MR. PARRIS:** If you look at page 4 -- I mean
17 line 4.

18 **THE COURT:** On 54?

19 **MR. PARRIS:** 53.

20 **THE COURT:** Okay. I'm on the wrong page. Hold
21 on.

22 53, okay. What line?

23 **MR. PARRIS:** Line 4. The question starts out,
24 "Any other bases."

25 **THE COURT:** Okay.

26 **MR. PARRIS:** Okay? And that's precisely what the
27 doctor just said, was that there were a lot of things
28 talked about at that -- at that -- well, he can say it

1 better than I can. But he's attempting to make a
2 cumulative -- there was a lot of questions and a lot of
3 bases, and now he's trying to make it the only one. So
4 it's not impeachment.

5 **MR. MCRAE:** Your Honor, I'm not trying to do that
6 at all. These questions have followed sequentially.
7 And if the Court reads the question, the Court will see
8 that the part that starts with "any other bases"
9 actually repeats the very last question that I just
10 asked the witness. And I then ask him, after I loop in
11 and cross-reference that, is there anything else?

12 So it's not at all a taking out of context.
13 It's incorporating his prior response. This is why I'm
14 saying the read-back should be not lines 14 through 15
15 but lines 4 through 13. I'm happy, if the Court says --
16 if you want me to go back to page 52 or 51, whatever,
17 but at the end of the day I think the Court will see
18 that what I've done with the witness is I've walked him
19 through the bases that he says that he has that opinion
20 about Latinos voting cohesively, and then I end up with,
21 is there anything else.

22 **THE COURT:** Okay. Overruled. You may read.

23 **MR. MCRAE:** Question, page 53, line 4:

24 "Any other bases on which you reach
25 the conclusion that Latino voters voted
26 cohesively -- excuse me -- that Latino
27 voters cohesively supported Latino
28 candidates as set forth in paragraph 10

1 of your declaration apart from what you
2 testified to already?

3 A If there are other elections
4 where the results are similar to the
5 ones that I discuss there, then that
6 would play a role in that statement.

7 Q Anything else?

8 A No.

9 **BY MR. MCRAE:**

10 Q Now, sir, one important statistic that you
11 believe supports your statement in your declaration that
12 non-Hispanic Whites were sufficiently cohesive to ensure
13 that Latino candidates usually lost is your opinion that
14 in two of the ten elections as many as a third of the
15 non-Hispanic White voters cast a ballot for the
16 non-Latino candidates; correct?

17 A In only two of the ten.

18 Q So with that qualification; correct?

19 A Well, it's a negative versus a positive
20 interpretation of that two out of ten.

21 **MR. MCRAE:** Can I look at the monitor, Your Honor?
22 I did not follow that.

23 **THE COURT:** Yes.

24 **MR. MCRAE:** I just need to take a quick look.

25 **THE COURT:** Well, I'm not sure if I understood the
26 question. In two out of ten races, non-White voters,
27 non-Hispanic voters? I'm not sure what that question
28 was.

1 **MR. MCRAE:** Yes. Let me start from the beginning.

2 **BY MR. MCRAE:**

3 **Q** One important statistic that supports your
4 assertion in your declaration that non-Hispanic Whites
5 were sufficiently cohesive to ensure that Latino
6 candidates usually lost is your opinion that in two of
7 the ten elections as many as a third of the non-Hispanic
8 White voters cast a ballot for the non-Latino
9 candidates; right?

10 That was the question. And, sir, your
11 answer was?

12 **A** Well, in only one-third of the elections
13 were as many as one-third of -- sorry. In only two of
14 the elections were as many as one-third of the
15 non-Hispanic Whites voting for Latino candidates.

16 **MR. MCRAE:** Your Honor, may I read from his
17 deposition transcript, page 54, line 22, through 55,
18 line 11?

19 **THE COURT:** 54, beginning line 22?

20 **MR. MCRAE:** Yes, to page 55, line 11.

21 **THE COURT:** Okay. Let me read it first.

22 **MR. MCRAE:** Sure.

23

24 (PAUSE IN THE PROCEEDINGS.)

25

26 **MR. MCRAE:** Your Honor, I'm focusing specifically
27 on page 55, to get to the meat of it, lines 8 through
28 11, but I'll read the whole thing for context.

1 **MR. PARRIS:** I don't see how it's impeachment,
2 Your Honor.

3 **THE COURT:** It doesn't seem to be impeachment.
4 Why do you think it's impeaching?

5 **MR. MCRAE:** The reason, Your Honor, is because
6 when I asked the question whether one important
7 statistic of that assertion was the fact that in two of
8 the ten elections as many as a third of the non-Hispanic
9 White voters cast a ballot for non-Latino candidates,
10 Dr. Kousser, particularly at the lines I just focused
11 on, says it's based upon an analysis of all elections,
12 the statistical analysis of all elections, that is
13 certainly one characteristic.

14 So what I did, Your Honor, and I do this
15 with all my questions, is I specifically incorporate the
16 exact statement that the witness makes in the answer and
17 I'm putting it back to him.

18 And so when he says on the witness stand
19 today something which -- and I'll confess part of it,
20 I -- maybe it's my deficiency, didn't understand some of
21 what he was saying. It certainly wasn't the statement
22 that I got in the deposition, which was a simple
23 acknowledgment that the statistics to which I pointed
24 him was one characteristic, in fact, certainly one
25 important characteristic, but it's probably based on all
26 of it.

27 And so my question wasn't was it only based
28 on that. It was whether it was one important statistic.

1 He answered that here. And the answer that -- I didn't
2 hear him say, yes, Mr. McRae, that is one of the
3 important characteristics -- statistics, as he said in
4 his deposition. But I'm happy to move on.

5 **THE COURT:** Okay. Maybe you should say, "Is that
6 a 'yes,' sir? Yes, the answer is, yes, that is one
7 characteristic?"

8 **MR. MCRAE:** Okay.

9 **THE COURT:** If you're confused, that's the way to
10 clarify before you jump to -- I think you think it's
11 impeachment.

12 So I'm going to sustain the objection.

13 **MR. MCRAE:** That's fine.

14 **THE COURT:** Clarify it. And try to get him to
15 commit, yes, your answer is this, or no, your answer is
16 something else.

17 **MR. MCRAE:** That's fine, Your Honor.

18 **THE COURT:** Okay.

19 **MR. MCRAE:** Thank you very much. May I proceed?

20 **THE COURT:** Yes.

21 **BY MR. MCRAE:**

22 **Q** Dr. Kousser, so the answer to my question
23 is a yes, that one important statistic that you believe
24 supports your statement that non-Hispanic Whites were
25 sufficiently cohesive to ensure that Latino candidates
26 usually lost is your opinion that in two of the ten
27 elections, as many of a third of the non-Hispanic White
28 voters cast a ballot for the non-Latino candidates?

1 **A** My finding that in only two of the
2 elections as many as one-third of the non-Hispanic
3 Whites cast a vote for Latino candidates, yes, that is
4 certainly a basis of my opinion.

5 **Q** Thank you. In fact it's an important
6 statistic in your opinion; right?

7 **A** That's what I said in the deposition and I
8 certainly stand by that.

9 **Q** Thank you, sir. And another basis on which
10 you make the statement non-Hispanic Whites were
11 sufficiently cohesive to ensure that Latino candidates
12 usually lost is that Latino surname candidates always
13 lost between 1946 and 1990, except for Tony Vazquez in
14 1990; right?

15 **A** Yes.

16 **Q** And -- but where you could not measure
17 whether the other elections in Santa Monica were
18 racially polarized, it is not necessarily the case that
19 these other elections were in fact racially polarized;
20 correct?

21 **A** They possibly may not have been racially
22 polarized, but non-Hispanic Whites were the overwhelming
23 proportion of the population, and they usually comprised
24 85 to 90 percent of the voters during that period, from
25 what we can gather, because they were 80 to 90 percent
26 of the population. And as a consequence they had it
27 within their power to elect whoever they wanted to,
28 non-Hispanic Whites, which is what they elected

1 generally, or Latino candidates.

2 **Q** But, again, sir, you don't know for sure
3 whether those elections were racially polarized; true or
4 false?

5 **A** That is correct.

6 **MR. MCRAE:** Your Honor, we're at noon. Should we
7 take our break for lunch?

8 **THE COURT:** Sure. Let's do that.

9 **MR. MCRAE:** Thank you.

10 **THE COURT:** Okay. 1:30, everybody.

11
12 (Noon recess was taken until
13 1:30 p.m.)

14 (THE NEXT PAGE IS 1238.)
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HON. YVETTE M. PALAZUELOS, JUDGE

DEFENDANTS.

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) CASE NO. BC616804
)
) REPORTER'S
) CERTIFICATE
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DATED THIS 11TH OF AUGUST, 2018.

_____, CSR, RPR, CRR, RMR #10807
OFFICIAL REPORTER

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